Supreme Court, U.S.
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No. 92-1234

In the Supreme Court of the United States

OCTOBER TERM, 1992

WADI KAHHAT, FARID KAHHAT, MIRANDA KAHHAT, AND CARMEN KAHHAT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable for pre-judgment interest on monies it seized under 21 U.S.C. 881 but returned pursuant to 28 U.S.C. 2465.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) and the opinions of the district court (Pet. App. B1-B5 and C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1992. The petition for a writ of certiorari was filed on January 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1989, the government suspected that Emilio Melendez-Bernal was conspiring to import cocaine

into the country. Gov't C.A. Br. 6. During the course of the investigation, the Drug Enforcement Administration (DEA) uncovered evidence that Melendez had been using bank accounts in the United States in connection with his drug trafficking. *Ibid.* Pursuant to 21 U.S.C. 881,[1] the government seized 23 bank accounts. Gov't C.A. Br. 6. An account belonging to the Kahhat family and holding $572,426.63 was one of the accounts seized. Pet. 2.

2. On August 8, 1990, the district court determined that there was no probable cause for forfeiture of the Kahhat account. Pet. App. B2. Pursuant to 28 U.S.C. 2465,[2] the court thus ordered the government to return the seized monies, which the government did. *Ibid.* The Kahhats then moved for pre-judgment interest; the district court denied the motion on the ground of sovereign immunity. *Id.* at A9. The court denied the Kahhats' motion for reconsideration. *Id.* at B3.

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[1] 21 U.S.C. 881(a)(6) authorizes the United States to forfeit

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, * * * [and] all proceeds traceable to such an exchange * * * except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[2] 28 U.S.C. 2465 provides in relevant part: "Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant."

3. The court of appeals affirmed the district court's decision not to award pre-judgment interest. The court noted that "[i]nterest may not be awarded against the government in the absence of express statutory or contractual consent." Pet. App. A10. And the court stated: "By its plain language, section 2465 does not authorize a waiver of the government's sovereign immunity from an award of interest." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 5-7) that the government must pay pre-judgment interest on the monies it seized and later returned. That contention is erroneous.

a. "As sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress* v. *Shaw*, 478 U.S. 310, 315 (1986). In addition, "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Id.* at 314. In analyzing whether Congress has waived the immunity of the United States, this Court "must construe waivers strictly in favor of the sovereign." *Id.* at 318. The no-interest rule provides "an added gloss of strictness" upon the usual rule of construction concerning waivers of sovereign immunity. *Ibid.*; see also *Missouri* v. *Jenkins*, 491 U.S. 274, 281 n.3 (1989) ("ultrastrict" rule of statutory construction regarding waiver of immunity from interest).

b. The rule in *Shaw* controls here because the statutory provision governing the return of seized property does not contain any express authorization for awards of interest. Section 2465 of 28 U.S.C. states: "Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant." As the court of appeals correctly observed, section 2465 "[b]y its plain language * * * does not authorize a waiver of the government's sovereign immunity from an award of interest." Pet. App. A10. The statute "contains no reference to interest. This congressional silence does not permit [this Court] to read the provision as the requisite waiver of the Government's immunity with respect to interest." *Shaw*, 478 U.S. at 319.

Petitioners nevertheless contend (Pet. 5) that the no-interest rule does not apply here because the *Shaw* rule is applicable only to suits brought *against* the government. The court of appeals correctly rejected this argument. In *Shaw*, this Court stated that "the United States is immune from an interest award" absent "express congressional consent to the award of interest." 478 U.S. at 314. An interest award is exactly what petitioners sought in this case.

Moreover, in analogous circumstances, Congress has expressly provided for interest on the return of property when it has intended such an award. For example, 26 U.S.C. 7426(g) provides for interest on funds that were seized by the Internal Revenue Service but then ordered returned by a court. The Court in *Shaw* cited 26 U.S.C. 7426(g) as an example of an express congressional waiver from sovereign

immunity with respect to interest and as support for the Court's conclusion that waivers should not be presumed absent such express language. 478 U.S. at 318 n.6.

Petitioners cite three district court cases for the proposition that "other courts have understood that the return of property * * * includes an award of interest." Pet. 6; see *United States* v. *All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 991 (E.D.N.Y. 1992); *United States* v. *Farese*, No. 80 Cr. 063 (MJL) (S.D.N.Y. June 26, 1989); *In re Search of 4330 N. 35th Street, Milwaukee, Wisconsin*, 142 F.R.D. 161, 171 (E.D. Wis. 1992). In neither *All Funds* nor *Search of 4330 N. 35th Street*, however, did the district court discuss the government's immunity from claims for interest or even mention *Shaw*. In an unpublished opinion, the district court in *Farese* did address *Shaw*, but avoided the no-interest rule by characterizing the award of interest as damages due to the government's lengthy retention of Farese's property. That analysis is incorrect, as this Court made clear in *Shaw*: "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321. Thus, "the character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976) (cited with approval in *Shaw*, 478 U.S. at 321). In any event, any

conflict between that unpublished district court decision and the unpublished decision of the court of appeals in this case does not warrant this Court's review.

2. Petitioners contend that the decision of the court of appeals in this case conflicts with the Fourth Circuit's decision in *In re Metmor Financial, Inc.*, 819 F.2d 446 (1987).[3] That contention is erroneous.

Metmor did not address the issue involved in this case. The court of appeals in *Metmor* held that when the government seizes property subject to a pre-existing mortgage, the terms and conditions that run with the mortgage are valid as against the United States and, so far as concerns the real estate, the judgment of condemnation is against the equity of redemption only. 819 F.2d at 448. As a general rule, "a holder of the equity of redemption can redeem from the mortgagee only on paying the entire mortgage debt." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579 n.7 (1935). Thus, the court in *Metmor* concluded that where the government seizes property encumbered by a secured note, with interest accruing, the property owner's equity is "subject to an obligation to repay the borrowed principal *and* to

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[3] Petitioners also cite two decisions from other circuits and another decision from the Fourth Circuit that expressly rely on *Metmor*. *United States* v. *Real Property Located at 2471 Venus Drive*, 949 F.2d 374 (10th Cir. 1991); *United States* v. *Federal Nat'l Mortgage Ass'n*, 946 F.2d 264 (4th Cir. 1991); *United States* v. *Six Parcels of Real Property Situated in Blount County*, 920 F.2d 798 (11th Cir. 1991). Those cases are to the same effect as *Metmor*.

pay interest on the unpaid balance until all of the principal [is] repaid." 819 F.2d at 449.

The funds seized from petitioners' bank account were not encumbered by any pre-existing property interest. Nor do petitioners stand in the same position as mortgagees having a security interest limiting the extent of the property seized. Rather, petitioners seek to be compensated for the lost opportunity cost of their capital. As the Court stated in *Shaw*, "claims grounded on the belated receipt of funds" or for compensation for loss "stem[ming] from an opportunity cost" are simply claims for interest and, hence, are barred by the no-interest rule. 478 U.S. at 322. There is no conflict between *Metmor* and the decision of the court of appeals in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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